Filed 7/24/20 Alden v. W.G. Realty CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

NICK A. ALDEN, Plaintiff and Appellant, v. W.G. REALTY et al., Defendants and Respondents.	B296259 (Los Angeles County Super. Ct. No. BC701333)

APPEAL from an order of the Superior Court of Los Angeles County. Yolanda Orozco, Judge. Reversed.

Nick A. Alden, in pro. per., for Plaintiff and Appellant.

Mark S. Neiswender for Defendants and Respondents.

Nick Alden appeals the trial court's order awarding sanctions against him pursuant to Code of Civil Procedure[1] section 128.7. Among other arguments, Alden contends that the trial court erred in concluding that W.G. Realty II LLC and Mark C. Joncich provided him with the safe harbor period required by section 128.7. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Ventura Action*

The dispute underlying this action began decades ago with a fraudulent real estate scheme. In the mid-1980's Donald Henry created a project known as Ventura 450 for the purpose of developing 450 acres of vacant land in Ventura County. He induced a number of people to invest over $2.5 million. Unknown to investors, Henry purchased the properties for only $500,000 and work never commenced on the project. Threatened with a lawsuit by investors, Henry agreed to transfer his interest in the Ventura properties to the investors. In February 1995 the investors recorded a deed transferring Henry's interest in the properties to W.G. Realty as trustee of the Chatsworth Investor's Trust (Chatsworth Trust).

Alden, an investor in the scheme and an attorney who had represented Henry, sued Henry to recover his legal fees and investment. In 1996 the court entered a stipulated judgment requiring Henry to pay Alden $512,750. Although the Ventura properties had been transferred to Chatsworth Trust, the judgment authorized Alden to execute on the Ventura properties. In November 1996 Alden sought to amend the judgment to

---

[1] All statutory references are to the Code of Civil Procedure.

include Chatsworth Trust and W.G. Realty. The trial court denied Alden's request because these entities had "not been named in this action."

After Alden recorded a judgment lien against the Ventura properties, in 2002 W.G. Realty and others filed a quiet title action against Alden in the Ventura Superior Court. Alden asserted he held an interest in the Ventura properties by virtue of the judgment against Henry. The trial court quieted title in W.G. Realty's favor. Division Six of this court affirmed the judgment. (*W.G. Realty v. Alden* (June 5, 2006, B183194 [nonpub. opn.].) The court held that the trial court correctly ruled that Alden did not have an enforceable lien on the Ventura properties because, although that judgment authorized Alden "to execute on the Ventura 450 properties and purports to grant a lien on those properties, Henry could not grant a lien on properties he no longer owned." (*Id*. at pp. 6-7.)

B. *Present Litigation*

With escrow closing on March 14, 2018 W.G. Realty sold Chatsworth Trust's remaining real estate for $1.2 million. In late March 2018 W.G. Realty transmitted a letter to the trust beneficiaries explaining the sale and calculating their share of the proceeds. On April 9, 2018 Alden filed this action against W.G. Realty and others.[2] In August 2018 W.G. Realty served

---

[2] Alden named as defendants: W.G. Realty LLC, W.G. Realty II LLC, Mark C. Joncich, Michael L. Joncich, Margaret Vogelsang, and Mark Neiswender. W.G. Realty II LLC, a successor to W.G. Realty LLC, and Mark C. Joncich, a member of W.G. Realty II LLC, appeared in this action. W.G. Realty and Joncich are collectively referred to as W.G. Realty.

Alden with a motion seeking monetary sanctions and the complaint's dismissal pursuant to section 128.7, subdivision (c)(1). On September 17, 2018 Alden filed a first amended complaint asserting causes of action for an accounting, conversion, and breach of fiduciary duties. In his first amended complaint, Alden alleged that the March 2018 letter to trust beneficiaries failed to provide details regarding a transaction consummated in 1997 involving the Ventura properties and that he did not know about a 1999 transaction also involving the properties mentioned in the letter. Alden also alleged that the March 2018 letter did not provide sufficient information about the March 2018 sale of the last parcel. Based on these allegations, in addition to compensatory and punitive damages, Alden sought the appointment of an independent trustee "to take over the affairs of [W.G. Realty]." Alden also alleged that the Ventura judgment, which had vacated his lien on the Ventura properties, was "void, as a matter of law."

On September 28, 2018 W.G. Realty filed the section 128.7 motion challenging the original complaint's allegations. On November 8, 2018 the trial court denied W.G. Realty's motion because the "motion was directed to the original complaint." W.G. Realty contends that on December 18, 2018 it electronically served Alden with a second section 128.7 motion directed to the first amended complaint. On January 10, 2019 W.G. Realty filed the second section 128.7 motion. In its motion W.G. Realty argued that Alden in the first amended complaint falsely denied knowledge of the 1997 and 1999 transactions involving the Ventura properties because Alden had represented himself in the Ventura action and the trial of that action had involved the 1997 and 1999 property transactions. W.G. Realty argued that Alden,

"by falsely alleging delayed discovery of facts he knew over 15 years ago," was "attempting to re-litigate issues that had been decided against him." W.G. Realty sought $24,497 in sanctions and dismissal of the first amended complaint.

Alden contended that W.G. Realty had not served the motion because he denied W.G. Realty's contention, based on correspondence between counsel, that there had been an agreement for electronic service of documents. Therefore, Alden argued that W.G Realty did not provide him with "the 21-day safe harbor to withdraw or appropriately correct the First Amended Complaint." In addition, after asserting that W.G. Realty lacked standing to defend the action, Alden argued that the Ventura judgment was void because the Ventura Superior Court had acted in excess of its power in modifying Alden's 1996 judgment. Alden further asserted that, if sanctions were granted, they should be entered against W.G. Realty "for making false accusations and filing a frivolous motion to intimidate [Alden]."

After a hearing, in its February 28, 2019 order, the trial court ruled that W.G. Realty had provided Alden with the 21-day safe harbor period. The trial court rejected Alden's argument "that at no time did he agree to service by email." Relying on emails dated October 26 and October 29, 2018, "in which [Alden] request[ed] email service of all filings and [W.G. Realty] agree[d] to electronic service," the trial court found that W.G. Realty's electronic service of the motion on December 18, 2018 had satisfied the service requirement in section 128.7 to commence the 21-day safe harbor period.

Based on his involvement in the Ventura action, the trial court also found that Alden had falsely alleged in the first

amended complaint that he had not been informed of the 1997 and 1999 transactions regarding the Ventura properties. The trial court also found that Alden "seeks to relitigate issues decided against him in the Ventura litigation." The trial court ruled that, in large part, Alden had filed the first amended complaint for an improper purpose.

The trial court dismissed the first amended complaint with prejudice except to the extent that the causes of action pertained to the March 2018 transaction. In addition, under section 128.7, the trial court ordered Alden to pay W.G. Realty $20,000 in sanctions. The trial court ruled, "It does appear to the Court that an enormous amount of time was spent in gathering and analyzing the documents which support the motion. And that the number of hours spent and the hourly rates are reasonable. However, because the Court finds that a few discrete claims are not brought for an improper purpose and are not frivolous, the Court will reduce the monetary sanctions to $20,000."

Alden timely appealed.

DISCUSSION

A. *Applicable Law*

Section 128.7 "authorizes trial courts to impose sanctions to check abuses in the filing of pleadings, petitions, written notices of motions or similar papers." (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 514.) Section 128.7, subdivision (b), provides that "[b]y presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry

reasonable under the circumstances, all of the following conditions are met: [¶] (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. [¶] (2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. [¶] (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

Section 128.7, subdivision (c)(1) "requires the party seeking sanctions to serve on the opposing party, without filing or presenting it to the court, a notice of motion specifically describing the sanctionable conduct. Service of the motion initiates a 21-day 'hold' or 'safe harbor' period. [Citations.] During this time, the offending document may be corrected or withdrawn without penalty. If that occurs, the motion for sanctions "'shall not'" be filed." (*Li v. Majestic Industry Hills LLC* (2009) 177 Cal.App.4th 585, 590-591.) This provision "'permits a party to withdraw a questionable pleading without penalty, thus saving the court and the parties time and money litigating the pleading as well as the sanctions request.'" (*Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 699; accord, *Malovec v. Hamrell* (1999) 70 Cal.App.4th 434, 442 ["the purpose of section 128.7 is to promote compliance. To this end, the statute permits withdrawal of a challenged pleading"].) If the document is not corrected or withdrawn during the 21-day safe harbor period, the motion for sanctions may be filed. (§ 128.7, subd. (c)(1).)

"If, after notice and a reasonable opportunity to respond,

the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." (§ 128.7, subd. (c).) Sanctions may include "directives of a nonmonetary nature," "an order to pay a penalty into court," and "payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation." (§ 128.7, subd. (d).)

B. *The Trial Court Erred in Concluding that W.G. Realty Provided Alden with the Required Safe Harbor Period*

Alden argues that the trial court erred in finding that W.G. Realty provided him with the 21-day safe harbor period required under section 128.7 because "there was no agreement for service via Email" and W.G. Realty's email service of the motion therefore "was ineffective." W.G. Realty argues that "it provided the safe harbor period" because email service of the motion was proper based on the parties' agreement for electronic service of documents. Because there was no agreement for electronic service regarding the section 128.7 motion, W.G. Realty failed to provide Alden with the required 21-day safe harbor period.

Section 128.7, subdivision (c)(1), provides, "Notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." Section 1010 states, "Notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter . . . ." For cases filed before January 1, 2019 section 1010.6(a)(2)(A)(i)

provides, "electronic service . . . is . . . authorized [if] a party or other person has agreed to accept electronic service in that specific action or the court has ordered electronic service . . . ."

In concluding there was an agreement for electronic service, the trial court relied on an email exchange between counsel.[3] Alden's October 26, 2018 email to W.G Realty's counsel stated, "are you also agreeable to email me all filings?" W.G. Realty's counsel responded on October 29, "The first email was sent in the morning and asked if I would agree to accept emails of all filings from you and if I would email my filings to you. As far as the current motion under CCP 128.7 goes, sure, I will email you the reply as soon as it is done." At that time the "current motion" was W.G. Realty's initial section 128.7 motion filed on September 28, 2018, which the trial court denied on November 18, 2018. There was no other evidence that Alden had agreed to accept electronic service.

The emails do not establish an agreement for electronic service. In response to Alden's offer of an agreement covering "all filings," W.G. Realty's counsel limited the agreement to the "current motion," which was W.G. Realty's first section 128.7 motion filed on September 28, 2018. W.G. Realty declined Alden's offer of electronic service for "all filings." Accordingly, there was no agreement for electronic service for W.G. Realty's service of the second section 128.7 motion on December 18, 2018. Under these circumstances, the trial court erred in finding there was an agreement for electronic service of W.G. Realty's section

---

[3] We grant Alden's motion to augment the record to include the emails between counsel dated October 26 and October 29, 2018. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

128.7 motion.[4] Because section 128.7, subdivision (c)(1) required W.G. Realty to serve Alden with the section 128.7 motion to commence the 21-day safe harbor period and W.G. Realty did not properly serve the motion, we reverse the February 28, 2019 order granting W.G. Realty's section 128.7 motion. (See *Nutrition Distribution, LLC v. Southern SARMs, Inc.* (2018) 20 Cal.App.5th 117, 124 ["the party seeking sanctions must serve the motion on the opposing party without filing or presenting it to the court. Service of the motion initiates a 21-day . . . hold or safe harbor period"].)

W.G. Realty's argument, that the trial court's findings regarding the argument for electronic service "cannot be attacked without a reporter's transcript," is unfounded. California Rules of Court, rule 8.120(b) requires a reporter's transcript on appeal only if "an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court . . . ." (Cal. Rules of Court, rule 8.120(b).) W.G. Realty does not argue that the hearing on February 26, 2019 was an evidentiary hearing at which the trial court received testimony or admitted documents in evidence. The trial court's finding of an agreement for electronic service was based on the two emails exchanged between counsel. Thus, the trial court's factual determination that there was an agreement for electronic service, issued later in a written order, was based on the papers submitted. (See *Korman v. Princess Cruise Lines, Ltd.* (2019) 32 Cal.App.5th 206, 213 ["appellant's challenge to the trial court's decision does not

---

[4] When the material facts are undisputed regarding the existence of a contract, as they are here, whether the contract exists is a question of law. (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208.)

rely on any evidence presented or the trial court's findings made at the hearing. Nor does respondent rely on any of the trial court's findings or statements made at the hearing"]; *Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 933 [reporter's transcript not necessary for meaningful review because "Bel Air does not claim that the hearing included any live testimony or the introduction of any other evidence"].)

Although W.G. Realty only argues that its December 18, 2018 electronic service on Alden commenced the 21-day safe harbor period, W.G. Realty mentions that documents filed in the trial court, which are not contained in the record, "evidence [Alden's] receipt of the motion through physical delivery to his address of record." However, W.G. Realty does not argue that it "served" the motion through physical delivery and there was no proof of service showing personal delivery. W.G. Realty's proof of service for the section 128.7 motion stated that W.G. Realty's counsel gave the motion papers to an overnight delivery carrier on December 18, 2018 for "Overnight Delivery: GSO" to Alden. Even if W.G. Realty had contended that it served the motion on Alden by overnight delivery on December 18, 2018, given that W.G. Realty filed the motion on January 10, 2019, adding 21 days under section 128.7, subdivision (c)(1) and adding two additional days under section 1013, subdivision (c), W.G. Realty's overnight delivery of the motion did not provide Alden with the full 21-day safe harbor period because W.G. Realty filed the motion on the 23rd day. (See *Li v. Majestic Industry Hills LLC, supra,* 177 Cal.App.4th at p. 595 ["[i]n sum, the central principle to be distilled from section 128.7's language and remedial purpose, as well as from appellate opinions interpreting section 128.7 and rule 11, is that the safe harbor period is mandatory and the full

21 days must be provided absent a court order shortening that time if sanctions are to be awarded"].)[5]

DISPOSITION

The February 28, 2019 order is reversed. Alden shall recover his costs on appeal. W.G. Realty's motion for sanctions is denied.

DILLON, J.*

We concur:

SEGAL, Acting P. J.

FEUER, J.

---

[5] Alden argues that the trial court erred because it denied his request for leave to amend the first amended complaint on April 10, 2019. However, Alden appealed from the trial court's February 28, 2019 order, and he did not appeal from the April 10, 2019 order.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.